NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
APPELLATE DIVISION

DADE ENGINEERING CORP. (DAECO),	)	
	)	
Petitioner,	)	**D.C. CIV.APP. NO. 2005/149**
	)	
v.	)	Re: Sup. Ct. Civ. No. 619/2001
	)	
RUTH REESE,	)	
	)	
Respondent,	)	
	)	
THE HONORABLE EDGAR D. ROSS, Judge, Superior Court of V.I.	)	
	)	
Nominal Respondent.	)	
	)	

On Appeal from the Superior Court of the Virgin Islands

Considered: January 26, 2006
Filed: April 13, 2006

BEFORE: **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **CURTIS V. GOMEZ,** Judge of the District Court of the Virgin Islands; and **AUDREY L. THOMAS**, Judge of the Superior Court, Sitting by Designation.

APPEARANCES:

Bruce P. Bennett, Esq.
Attorney for Petitioner.

K. Glenda Cameron, Esq.
Verne Hodge, Esq.
Attorneys for Respondents.

MEMORANDUM OPINION

PER CURIAM.

The petitioner, Dade Engineering Corp. ("Dade" or

"petitioner") asserts it was improperly stripped of its protections under the attorney-client and work-product privileges, based on a procedural violation of the discovery rules. Dade argues in that regard that the trial court improperly found it had waived those privileges by its failure to provide privilege logs in resisting discovery. The respondent challenges our jurisdiction to consider this mandamus petition to review what would otherwise amount to an interlocutory discovery order.

This Court may properly exercise jurisdiction to consider this petition and will grant the writ as to those challenges under the attorney-client privilege, as the applicable statute does not impose waiver for failure to fully articulate the basis for the claimed privilege. However, this Court will remand the work product issue to the trial court for further consideration consistent with this opinion.

I. STATEMENT OF FACTS & PROCEDURAL POSTURE

Respondent Ruth Reese ("Reese" or "respondent") served requests for the production of documents on the petitioner. In its response, the petitioner refused to comply with several of those requests, citing the attorney-client and work-product privileges. The petitioner asserts the information sought was protected because it was generated subsequent to litigation by or at the direction of counsel. The challenged discovery requests are outlined below.

In its requests for production of documents, the appellee sought "copies of all documents, notes, memoranda, correspondence, writings and any other tangible item that refers or relates to any investigation, inspection, examination, test or analysis of or concerning the freezer that is the subject of this lawsuit." [See Respondent's Opposition to Pet. For Writ of Mandamus, at 2]. Petitioner refused that discovery request, citing attorney-client privilege, and Reese responded by seeking production of a privilege log pursuant to Federal Rule of Civil Procedure 26. [See Letter to Attorney Cole dated Nov. 12, 2002, at 1]. Dade, in a letter to opposing counsel, again responded that the information requested, having been generated "subsequent to the initiation of litigation and the appearance by my firm as defense counsel," was protected by attorney work product and attorney client privilege. Dade contended no privilege log was required for information prepared by and at the behest of counsel or from client to counsel after litigation commenced. [See Letter to Attorney Rohn dated Nov. 14, 2002 at 3].

In its Demand for Production No. 29, Reese additionally requested "all reports, charts, summaries or other related documents setting forth the result of any tests or investigations to determine the cause of the incident referred to in plaintiff's complaint." Dade objected to the request based on attorney-client privilege and work product, noting, "All documents otherwise

responsive to these document production demands were generated subsequent to the initiation of litigation and the appearance by my firm as defense counsel." [*Id*. at 2].

Dade similarly responded to Reese's Demand for Production No. 30. That discovery request sought "any and all statements, tape recordings, reports, writings or similar items in any manner recorded, prepared by defendant or taken from any person with regard to the incident or damages set forth in plaintiff's complaint." Dade responded that, all investigations, inspections and tests' of the freezer had been conducted under the supervision of counsel and was, therefore, protected under the attorney-client and work-product doctrines. Dade also refused to submit a privilege log for those items.

In Interrogatory No. 20, Reese sought to discover whether any investigation, examination, test or analysis relevant to the litigation was conducted by anyone, "including attorneys, employees, agents and independent contractors." That interrogatory further requested information regarding the date of each such investigation, a description of the scope of such investigation, the names of each individual present, the findings of such investigation, the existence of a written report covering any investigation, and the location of each item investigated. Dade responded to that request, by letter dated November 1, 2002, as follows:

> As stated in our response, the only investigations have been conducted by or at the direction of counsel. You are entitled in discovery to answers to specific questions you may pose from time to time. You are not, however, entitled to a report of counsel's activities in defending the case. You are not entitled, for example , to the names of persons that I have interviewed or the names of persons assisting me in the effort. Likewise, you are not entitled to the substance of any communications between myself and my client that would reveal my mental impressions or my work product. We have responded elsewhere in discovery to specific questions relating to our knowledge of facts concerning this incident. . . . We decline to answer a vague and general interrogatory that demands to know the results of our specific efforts as counsel to defend this case.

[Letter to Attorney Rohn dated Nov. 1, 2002].

In response, Reese requested that the petitioner produce a privilege log, to permit an independent assessment of the claimed privilege. However, the petitioner took the position that no privilege log was required for items claimed to be privileged under the attorney-client or work-product doctrines, and no log was submitted.

After a subsequent discussion, as reflected in letters between the parties, to attempt to resolve the discovery differences, the respondent filed a motion to compel in the trial court, and the respondent filed an opposition brief. Based on the submission of the parties, the trial court determined that the petitioner had waived any privilege under the rule and

compelled discovery.[1] That court later denied the petitioner's motion for reconsideration of that order.

Dade now seeks mandamus relief to direct the trial court to vacate its order granting the respondent's motion to compel discovery. The respondent has filed a response, in which she challenges this Court's jurisdiction to determine this issue.

II. DISCUSSION

A. Jurisdiction and Standards of Review

This Court may exercise jurisdiction to consider actions seeking mandamus relief, which are based on the actions or inactions of a Superior Court judge. *See* V.I.R. App. P. 13(a).

However, mandamus is an extraordinary remedy and should not be utilized as a substitute for appeal. *See In re Ford Motor Co.,* 110 F.3d 954, 957 -58 (3d Cir. 1997)*(citing Madden v. Myers,* 102 F.3d 74,77 (3d Cir.1996)). Rather, resort to the mandamus remedy is appropriate only in limited circumstances where it is shown: to be "necessary or appropriate in aid of [appellate] jurisdiction;" there are no other adequate means of obtaining relief; and the right to the writ is clear and indisputable. *Id.;*

[1] Although Dade's objection implicated protection under the work product doctrine, the trial court's order compelling Dade to produce the requested information did not indicate it was doing so on the basis of waiver or offered any reasons for its order compelling this discovery. However, the trial court's order denying reconsideration of its discovery order indicated the basis for compelling the discovery was the appellant's failure to produce a privilege log resulting in waiver. [See Order Denying Recons. dated July 22, 2005]. Given the arguments presented below and the trial court's discovery order and order denying reconsideration, it is clear the trial court based its ruling on waiver as well.

see also Glenmeade Trust Co. v. Thompson, 56 F.3d 476, 483(3d Cir. 1995)("Once these prerequisites are met, the issuance of the writ is a matter of discretion.")(citation omitted). Given the limitations of mandamus relief to matters to which the petitioner has a clear and indisputable right, we are constrained to grant such relief in this context only where the trial court committed a clear error of law. *See Glenmeade*, 56 F.3d at 483(noting that mere abuse of discretion is an inappropriate basis for exercising mandamus jurisdiction); *Sporck v. Peil,* 759 F.2d 312, 314 (3d Cir. 1985)("[B]ecause where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is clear and indisputable, a writ of mandamus will only be granted for clear error of law.")(quoting *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980))(internal quotation marks omitted).[2]

The factors for assuming mandamus jurisdiction have been met here. This Court has appellate jurisdiction to generally review discovery orders and issues arising in civil matters before the Superior Court. *See* V.I.R.A.P. 5; The Omnibus Justice Act of 2005, Act No. 6730, § 54 (amending Act No. 6687(2004), which repealed 4 V.I.C. §§ 33-40, and reinstating appellate

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[2] *But see Dawsey v. Government of V.I.,* 931 F.Supp. 397, 400-01 (D.V.I. App. Div. 1996)(noting, in considering failure of trial court to act, that mandamus is appropriate where there is: (1) a clear abuse of discretion amounting to a usurpation of power; (2) a clear and indisputable right to relief; (3) an absence of any other adequate means to receive that relief; and (4) irreparable injury if the error goes unremedied.)

jurisdiction in this Court); Revised Organic Act of 1954 § 23A, 48 U.S.C. § 1613a.[3] Therefore, the challenged order may appropriately be decided in aid of our potential appellate jurisdiction. *See Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 591 (3d Cir. 1984).

Moreover, where, as here, the issue challenges an interlocutory order which presents no substantial question requiring certification,[4] and where the petitioner seeks redress from a discovery order implicating the attorney-client privilege or work product doctrine, mandamus review is appropriate. *See e.g., Bogosian,*738 F.2d at 591 ("When a district court orders production of information over a litigant's claim of a privilege not to disclose, appeal after a final decision is an inadequate remedy . . . for compliance with the production orders complained of destroys the right sought to be protected."); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1118 (3d Cir. 1986)("[M]andamus has been held to be appropriate when a failure to issue the writ would lead to the disclosure of confidential materials."). Accordingly, we will exercise mandamus jurisdiction.

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[3] The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp.2003), *reprinted in* v.I. Code Ann. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp.2003) (preceding V.I. Code Ann. tit. 1).

[4] *See* V.I.R.A.P. 6; see also, *In re Ford*, 110 F.3d at 957-58 (noting that, absent such substantial question, the movant would be left to await final judgment before review is available).

B. Whether the Trial Court Committed Clear Error of Law.

Having determined that mandamus jurisdiction is proper, we must next consider whether the trial court committed a clear error of law in finding waiver based on the petitioner's failure to more fully outline the matters claimed to be privileged.

1. Attorney-Client Privilege

Confidential communications between counsel and client for the purpose of obtaining representation is afforded almost absolute protection from discovery. *See* 5 V.I.C. § 854(1).[5] That privilege is statutorily defined in this jurisdiction and, therefore, must take precedence over the privilege as set forth in the Federal Rules of Civil Procedure or the common law. Hence, we look to that statute to resolve the issue of waiver.

Section 854 protects "communications *found by the judge* to have been between lawyer and his client in the course of that relationship and in professional confidence." *Id.* (emphasis added); *but see* 5 V.I.C. § 854 (2)(enumerating various communications excepted from this protection). As contemplated in the statute, "'communication' includes advice given by the lawyer in the course of representing the client and includes

[5] The federal discovery rules, applicable by virtue of Superior Court Rule 39, permit the discovery of matters relevant to the claim or defense, including unless determined to be privileged. FED. R. CIV. P. 26(b). Information is relevant for discovery purposes if it is either admissible or "reasonably calculated" to lead to the discovery of admissible evidence. *See* FED. R. CIV. P. 26(b)(1) and advisory committee notes.

disclosures of the client to a representative, associate or employee of the lawyer incidental to the professional relationship." 5 V.I.C. § 854(3). Moreover, it is well-established – and the language of section 854(3) makes clear – that the privilege protects only communications and not relevant facts that happen to be in an attorney's file. See *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 862-63(3d Cir. 1994); *see also, In Re Cendant Corp*, 343 f.3d 658, 662 (3d Cir. 2003).

The express language of the statute makes clear that the determination that a communication is protected, as defined, is one for the court. Although this language would necessarily require the litigant to sufficiently disclose information from which the judge could discern the nature of the communications and whether they fell within the protection of the statute, there is no provision for a finding of waiver for failing to do so.[6] Moreover, in addition to the exceptions noted in section 854 (2), the Legislature expressly defined in the statutory scheme the circumstances that would effect a waiver of the attorney-client privilege as follows:

> **§ 864. Waiver of privilege by contract or previous disclosure**
>
> A person who would otherwise have a privilege to

[6] *Cf., Jackson v. County of Sacramento,* 175 F.R.D. 653, 655-56 (E.D.Cal. 1997)("Traditionally, 'waiver' is the intentional relinquishment of a known right. Imperfections unaccompanied by prejudice in defendant's efforts to protect the confidentiality of the attorney-client relationship do not support finding waiver.").

> refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has (a) contracted with anyone not to claim the privilege or,(b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by anyone.

5 V.I.C. § 864.

Given the absence of language in either section 854 or 864 to permit a finding of waiver based on the specificity with which the privilege is asserted, and given the trial court's reliance on the federal rules of civil procedure and cases decided thereunder, to the exclusion of the local statute addressing the issue of waiver, we conclude the trial court committed a clear error of law in compelling discovery on those grounds. Mandamus relief is, therefore, appropriate.[7]

This determination is limited to the issue of waiver as it relates to the attorney-client privilege. In so holding, this Court offers no opinion regarding whether the challenged information is, in fact, entitled to the protection of section 854. That remains a question to be decided by the trial court in the first instance, after full review of the record and the submission of the parties.

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[7] Respondent has already filed an opposition to the petition for mandamus relief, without waiting for this Court's direction to do so, as required under V.I.R.App. P. 13(mandamus relief may be granted, if warranted, but a response should be requested from respondents if the Court is inclined to grant relief).

2. Work Product Privilege

The work product privilege is not covered in our statutes; therefore, we turn to the federal discovery rules, applicable through Superior Court Rule 39. The federal rules codify the work product doctrine as developed in the common law.

Where information, sought under Fed. R. Civ. P. 26(b), was prepared specifically for the purpose of litigation or for trial by a party or his representative, the adverse party may obtain discovery only upon a showing of "substantial need" and by showing that the seeking party cannot otherwise obtain the substantial equivalent of such materials without undue hardship. *See* FED. R. CIV. P. 26(b)(3). Notwithstanding that provision, the rule provides an almost absolute protection against discovery of opinion "work product," consisting of "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.*

Despite the protections provided under the rule, however, a party may not resist discovery based merely on a bare assertion that the challenged information is protected. Rather, the rules mandate that the party claiming privilege expressly assert such protections and "describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability

of the privilege or protection." *See* FED. R. CIV. P. 26(b)(5). This limitation recognizes that the determination that information is privileged is not left to a party's unilateral determination, but must be sufficiently exposed to permit an independent assessment by the court and the adverse party. Therefore, although the discovery rule does not employ the term "privilege log," it clearly requires sufficient disclosure to permit an independent determination of a privilege.

Given the requirements of Rule 26(b)(5) and the burden borne by the party resisting discovery to properly assert and establish the existence of a privilege, the federal discovery rules contemplate that a court may, in its discretion, find that a party has waived the privilege by failing to comply with Rule 26(b)(5). *See* Fed. R. Civ. P. 26(b)(5) advisory committee notes; *Massachusetts School of Law at Andoyer, Inc. v. Am. Bar Assoc.*, 914 F.Supp. 1172, 1178 (E.D.Pa. 1996)("failure to assert a privilege properly may amount to a waiver of that privilege").[8] However, that party would nonetheless be entitled to the

[8] *But see United States v. Philip Morris Inc.*, 347 F.3d 951, 954 (C.A.D.C. 2003)(noting waiver of a privilege most suitable for cases of unjustified delay, inexcusable conduct, and bad faith); *see also Ritacca v. Abbott Lab.*, 203 F.R.D. 332 (N.D. Ill. 2001)("Minor procedural violations, good faith attempts at compliance, and other such mitigating circumstances militate against finding waiver"); *Jackson,* 175 F.R.D. at 655-56 (mere imperfects in filing insufficient for waiver); *B. Braun Medical Inc. v. Abbott Laboratories,* 1994 WL 422287, *1(E.D.Pa. 1994)(finding that, rather than invoking the "harsh remedy of waiver" for failure to comply with Rule 26(b)(5), the court would instead compel production of a privilege schedule as "the better course").

protections of 26(b)(3), which provide an almost absolute privilege to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories" of his attorney or representative. *See* Fed. R. Civ. P. 26(b)(3).

The trial court did not address the protections afforded under Fed. R. Civ. P. 26(b)(3) before compelling discovery, despite counsel's protestations that the broad scope of discovery would encompass such mental impressions; nor did it distinguish between opinion and ordinary work product. *See Sporck*,759 F.2d at 316. In addition, with regard to Demand for Production No. 28, the trial court also did not address the petitioner's objection to the discovery as unnecessarily vague, overly broad and burdensome.

III. CONCLUSION

In view of the foregoing, the trial court's finding of waiver of the attorney-client privilege amounted to a clear error of law, where it was improperly based on federal procedural rules and contrary to an express statute on the issue. Mandamus relief is, therefore, warranted.

However, we will remand the work product issue to the trial court with instructions to determine the nature of the challenged material and the applicability of the work product doctrine and, further, to implement procedures to protect the attorney's opinion work product. The court should further consider the question of overbreadth left unresolved regarding Demand No. 28.

Because we trust the trial court will address the concerns noted herein, we decline to grant mandamus relief in this regard.

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	)	
Petitioner,	)	**D.C. CIV.APP. NO. 2005/149**
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	)	
RUTH REESE,	)	

Respondent,	)
THE HONORABLE EDGAR D. ROSS, Judge, Superior Court of V.I.	)
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APPEARANCES:

Bruce P. Bennett, Esq.
Attorney for Petitioner.

K. Glenda Cameron, Esq.
Verne Hodge, Esq.
Attorneys for Respondents.

ORDER OF THE COURT

PER CURIAM.

AND NOW, for the reasons more fully stated in a Memorandum Opinion of even date, it is hereby

ORDERED that the petition for writ of mandamus is **GRANTED**, **in part**, insofar as it relates to the discovery challenges based on attorney-client privilege. It is further

ORDERED that this matter is **REMANDED** to the trial court for further consideration of the remaining issues, consistent with

this opinion.

SO ORDERED this 13th day of April, 2006.

A T T E S T:

WILFREDO F. MORALES
Clerk of the Court

By:_____
Deputy Clerk

Copies to:
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